IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1485

THOMAS J. HILLIGOSS AND KAY BERRYMAN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Appellants,

vs.

ARTHUR J. LADOW, AS MAYOR OF THE CITY OF KOKOMO, INDIANA, ET AL.,
Appellees.

GERALD SWING AND MARGARET TOMLINSON, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Appellants,

vs.

ARTHUR J. LADOW, AS MAYOR OF THE CITY OF KOKOMO, INDIANA, ET AL.,
Appellees.

APPEAL FROM THE COURT OF APPEALS OF INDIANA, SECOND DISTRICT.

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS.

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ARGUMENT.

Appellants' jurisdictional statement makes a showing that the construction of the pension statutes, IC 19-1-24 and IC 19-1-37,

put forward by the Court of Appeals of Indiana, Second District, is untenable and that the result in the case could have been reached only by giving effect to IC 19-1-46, the statute whose validity is in question on this appeal. Although appellees have moved to dismiss this appeal on the ground that it does not present a substantial federal question and that the judgment rests on an adequate non-federal basis, they have made no attempt to show that the construction of the pension statutes adopted by the court below has any fair or substantial support in prior authority or sound reason. They simply take the position that it is none of this Court's business whether the construction adopted is right or wrong. (Brief, p. 5.) However, the cases cited in the jurisdictional statement to sustain the jurisdiction of this Court hold to the contrary.

In arguing that the court of appeals did not give effect to IC 19-1-46, appellees make the following points: (1) that the pensioners had acquiesced for 40 years in a construction of the pension statutes by the city of Kokomo that excluded fringe benefits from the computation of pensions; (2) that the Howard Superior Court had upheld such construction with respect to health insurance premiums and clothing allowances prior to the enactment of IC 19-1-46; and (3) that the decision of the Court of Appeals of Indiana, Second District, merely agreed with the lower court's interpretation of the pension statutes. They conclude, on the basis of this reasoning, that it is absurd for appellants to argue that the court of appeals gave effect to IC 19-1-46.

At the outset, it is necessary to correct appellees' statement that "the police and firemen's pensions for the City of Kokomo, Indiana were created by statute in 1937." (Brief, p. 2.) While the firemen's pension statute, IC 19-1-37, had its origin in Acts 1937, Ch. 31, the police pension statute, IC 19-1-24, dates from Acts 1925, Ch. 51. As originally enacted, pensions payable upon retirement were fixed sums ranging from $50.00 to $75.00 per month, depending upon length of service. Acts 1931, Ch. 58,

amended the statute to authorize the board of trustees of the police pension fund to calculate pensions based upon "50% per month of such salary as is at the time of such application paid to a first-class patrolman." The amount of the pension did not vary as the salary of the first-class patrolman changed. *Klamm* v. *State of Indiana ex rel. Carson,* 235 Ind. 289, 126 N. E. 2d 487 (1955). The provisions of the statute requiring pensions to fluctuate as the pay of active policemen increases or decreases were added to the statute by Acts 1955, Ch. 77, § 2, effective January 1, 1956.

The first fringe benefit paid by the city of Kokomo to active policemen and firemen was the clothing allowance authorized by IC 19-1-10. This statute had its origin in Acts 1949, Ch. 14, and was effective January 1, 1950. The minimum authorized allowance was initially $100.00 per year. Starting in 1960 the minimum allowance was raised to $125.00 per year, and in 1968 to $200.00 per year, where it has since remained. The city of Kokomo started paying the allowance in 1951 and never paid more than the statutory minimum until 1972. In that year it raised the amount paid from $200.00 to $400.00 per year, and in 1973 it increased the amount to $500.00 per year.

Fringe benefits other than the clothing allowance were first paid in 1971. In that year, the city commenced paying holiday pay and 49% of health insurance premiums. In 1975, it started paying shift premium pay in the police department. Since prior to 1971 the only fringe benefit paid was the statutory minimum clothing allowance, which was a negligible factor in the compensation of active policemen and firemen, it is a gross distortion for appellees to argue that pensioners had acquiesced since 1937 in a construction of the pension statutes that excluded fringe benefits from the computation of pensions. On the contrary, when fringe benefits started to become an increasingly substantial factor in the compensation of active policemen and firemen, the pensioners promptly registered their protests, formed an association, met with city officials over a period of many

months, and ultimately brought the actions that are involved on this appeal.

Appellees place great importance on the ruling of the trial court, since it was made prior to the enactment of IC 19-1-46. They contend that the opinion of the court of appeals was "based upon the same type of analysis of the language of the original Pension acts which resulted in the trial court's finding that the fringe benefits in question did not form a part of the pension base under the language of the statute as it was originally written." (Brief, p. 6.) This is simply not true. The court of appeals did not adopt the rationale of the trial court's opinion but formulated an entirely different rationale that would give full effect to IC 19-1-46. An analysis of the opinion of the trial court, which is appended to the Jurisdictional Statement at pp. A16-A24, will make this very clear.

Four fringe benefits, which had been excluded from pension computations, were at issue in the trial court. These were holiday pay, shift premium [a form of incentive] pay, health insurance and clothing allowance. All four are excluded from pension calculations by the subsequently enacted IC 19-1-46. Nevertheless, the trial court held for appellants with respect to the first two-named fringe benefits.

In considering holiday pay, the trial court did not purport to construe the statutory language but simply and directly held that "there is no showing of any rational basis to deny that this holiday pay is a part of their salary or wages, and holiday pay should be included as a part of salary or wages for the purpose of computing the pensions to which plaintiffs are entitled." (Page A17.) Since holiday pay is paid annually in a single lump sum, this holding is squarely opposed to the construction of the pension statutes adopted by the court of appeals that "the interchangeable use of the words 'salary' and 'monthly pay' ('monthly wage') signifies that the benefit formula has reference to a first-class patrolman's or fireman's *regular salary*, exclusive of fringe benefits and other forms of added compensation." (Page A8.)

In considering shift premium pay, the trial court noted "that pension statutes are enacted to benefit the pensioners and are to be liberally construed in favor of the pensioner," and "that police and firemen's pensions are to be computed from the salary or the compensation of the 'highest paid' first-grade patrolman or first-class fireman in the department." In holding that shift premium pay should be included in pension calculations, the trial court concluded that "clearly, the highest paid would be the person in the department who is drawing maximum longevity pay and maximum shift premium pay." (Pages A18-A19.) By contrast, the court of appeals held that the pension statutes are "ultimately directed toward the general welfare of the taxpaying public." (Page A10.)

In considering health insurance contributions by the city, the trial court noted that salary and wages are taxable as income and noted that 26 U. S. C. § 106 excludes employer's contribution to health insurance from the employee's gross income and that 42 U. S. C. 409(9)(b) defines wages, for purposes of Social Security, as not including payments made by an employer on account of an employee's health insurance. Accordingly, the trial court held that health insurance contributions by the city are not salary or wages within the meaning of the pension statutes. (Pages A20-21.) By contrast, the court of appeals conceded that health insurance contributions are "an integral part of the compensation package," but held that "employer insurance programs and other fringe benefits are not salary in the sense of a fixed amount payable at stated intervals." (Page A6.) However, the court of appeals ignored the fact that the employer's contributions supplement the employee's portion of the premium that is deducted from each paycheck. Thus, the court of appeals rejected the rationale put forward by the trial court to justify exclusion of health insurance contributions from pension calculations and substituted a rationale of its own that is untenable in the light of the facts.

In considering the clothing allowance, the trial court noted that pensioners are not required to wear uniforms but ignored the fact that the allowance is paid to active members of the police and fire departments who are not required to wear uniforms. It also relied on IC 19-1-10-2, regarding uniforms furnished by the city, which is wholly irrelevant to the situation where the city elects to pay a clothing allowance. Moreover, since the clothing allowance must be reported by the recipient as gross income under 26 U. S. C. § 61, the exclusion of the clothing allowance from pension calculations is inconsistent with the rationale adopted by the trial court to justify exclusion of health insurance contributions. By contrast, the rationale adopted by the court of appeals is that " 'salary' does not include all forms of compensation, only that which is paid on a regular and periodic basis in exchange for services," and that "the annual cash payment is supplemental to, and not an integral part of, the employee's *regular salary*." (Page A12.)

In summary, it is clear that the rationale of the opinion of the trial court equates the words "salary" and "monthly wage" with compensation in general but holds that health insurance contributions and clothing allowance are not compensation. In contrast, the court of appeals concedes that health insurance contributions and clothing allowance are compensation but holds that the words "salary" and "monthly wage," as used in the pension statutes, mean something less than total compensation. Since the part of the trial court's decision excluding health insurance contributions and clothing allowance from pension calculations is inconsistent with the part that includes holiday pay and shift premium pay, and since the legislature in IC 19-1-46 directed that all fringe benefits, including the four just named, be excluded from such calculations, it is clear that the court of appeals in its decision gave effect to IC 19-1-46, because it adopted a rationale, however untenable, that would accomplish the purpose. In *Houston & Texas Central R. Co.* v. *Texas,* 177 U. S. 66 (1900), it was held that a decision of a state court may

give effect to a state statute and thereby impair the obligation of a contract, although the court does not mention the statute.

Respectfully submitted,

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